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No. 98-___

In The

Supreme Court of the United States

October Term, 1997

BILLY JOE TURLINGTON AND
ELLEN JOCILE TURLINGTON,

Petitioners,

v.

ATLANTA GAS LIGHT COMPANY,
RANDY CURRY, AND ROBERT MILLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an employee who is admittedly denied training because of his age and thereafter denied a job because of that lack of training barred from bringing suit under the ADEA because he failed to file a charge of discrimination within 180 days of the denial of *training*, even though he did file a charge within 180 days of the denial of the *job*?

PARTIES TO THE PROCEEDINGS

The petitioners in this case, plaintiffs and appellants below, are Billy Joe and Ellen Jocile Turlington. Respondents in this case, defendants and appellees below, are Atlanta Gas Light Company, Randy Curry and Robert Miller.

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PETITION FOR A WRIT OF CERTIORARI

Billy Joe and Ellen Jocile Turlington respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 135 F.3d 1428 (11th Cir. 1998) and is reprinted beginning at page App. 1 of the appendix to this petition. The opinion of the United States District Court for the Northern District of Georgia is unpublished and is reprinted beginning at page App. 23 of the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on February 26, 1998. The petition for rehearing was denied on May 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The provision at issue is a portion of the Age Discrimination in Employment Act ("ADEA") specifically 29 U.S.C. § 626(d)(1). This provision is reprinted in the appendix to this petition beginning at page App. 33.

STATEMENT OF THE CASE

This case presents the question, in a disparate treatment case, whether an employee who is denied training because of his age and later denied a job because of that denial of training is forever barred from bringing suit because he failed to file a charge of discrimination within 180 days of the denial of the training, even though he did file a charge within 180 days of the denial of the position.

* * *

Petitioner Billy Joe Turlington was employed by the Atlanta Gas Light Company ("AGL") in its Information Systems Department ("IS Department") from May of 1967 through July of 1993. App. 2. In February 1990, having been a Supervisor of Shift Operations for 10 years, Turlington was demoted to the position of Class "A" Computer Operator. *Id.* Turlington presented evidence that from February of 1990 on AGL denied him the on-the-job training, practice time, skill and software training provided to his younger co-workers. App. 2. When he complained of the denial, his supervisor told him he was incapable of learning new skills. *Id.*

Turlington's evidence included the affidavit of an IS Department employee responsible for training, Gary Boykin, who confirmed that Turlington did not receive the same training as younger employees, and who stated that Turlington's supervisor said, "the younger employees were able to grasp the new technology faster and better than the older employees such as Mr. Turlington." App. 2-3, n. 2. Boykin testified that Turlington not only had the ability to learn but used his own vacation time to develop his skills. *Id.*

After three years as a Class "A" Operator, Turlington was transferred to another division of the company in July 1993 and given a job manually constructing display signs. App. 3.

In September 1994, Turlington attempted to return to the IS Department by applying for a Class "C" Computer Operator position. *Id.* Class "C" is a lower level than Class "A". *Id.*, n. 4. On October 12, 1994, he was notified that "[d]ue to your previous performance in the department we have rejected your request to be considered for this posting." R. EXH-BT, Dft. Exh. 10. Turlington filed a charge of discrimination for failure to hire because of his age with the EEOC on December 16, 1994. App. 3. He was 54 years old at that time. *Id.*

Appellant's charge to the EEOC, attached to his Complaint R. 1-1, Exh. A, stated:

> I have continually been discriminated against for the past several years due to my being over forty years of age and not having the opportunity, in its latest instance on October 12, 1994, to transfer to a position within Information Systems Division of the company as a computer operator "C" salary grade 23. This is a job for which I am qualified, trained and experienced. I previously worked in that Department to which I was to transfer as a computer operator.

The charge further listed Turlington's various college degrees in data processing, programming and business and concluded

> The only reason that my performance when I was previously in the IS Operations Department might have been deficient was that I had not

> been given the appropriate training as other younger people were.

Id.

Turlington filed a complaint in the United States District Court for the Northern District of Georgia alleging various state law claims and violations of the Age Discrimination in Employment Act. App. 4-5. The alleged ADEA violations included Turlington's demotion in February of 1990, the failure to provide him adequate training from February 1990 to July 1993, his transfer in July 1993, the refusal to hire him for the Class "C" Computer Operator position in October of 1994, and his later discharge. App. 5.

Defendants filed a motion for summary judgment which included a request for attorneys fees. *Id.* The district court dismissed the state law claims, granted summary judgment to AGL on the ADEA claim and awarded attorneys fees and costs to the Defendants. *Id.*

The district court's opinion never specifically mentioned or analyzed Turlington's claim for the denial of the Class "C" Computer Operator position, but merely stated:

> First, given the date Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission, Defendant correctly points out that this court only can consider events occurring in June 1994 or later. 29 U.S.C. § 626(d)(1).

App. 27.

The district court did note that Turlington had claimed that AGL's evaluation and training systems discriminated against older workers, but observed that the evaluations were done prior to June 1994 and the denial of training occurred between 1990 and 1993. App. 29. The court concluded:

> Under certain circumstances, allegedly discriminatory yet unchallenged behavior, outside of the relevant limitations period, may buttress an ADEA claim if future employment decisions are based on the discriminatory behavior. The court finds that this is not such a circumstance. Indeed plaintiff failed to present sufficient evidence in support of his assertion that the evaluation and training systems were discriminatory.

App. 29.

On appeal, the Eleventh Circuit vacated that portion of the district court's judgment awarding attorney fees and costs.[1]

Although the Eleventh Circuit disagreed with the district court's analysis in several respects,[2] it nonetheless affirmed the district court's grant of summary judgment by holding that Turlington could not use time-barred evidence of allegedly discriminatory training practices in order to establish a *prima facie* case, relying on *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), and *Del. State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). App. 11.

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[1] Applying *Kreager v. Solomon & Flanagan, P.A.*, 775 F.2d 1541, 1542-43 (11th Cir. 1985), to ADEA claims.

[2] App. 9-10 & n. 10.

The Eleventh Circuit described Turlington as contending that "he *would have been* qualified for the Class C Computer Operator position if he had received better training, and thus better evaluations, while working as a Class A Computer Operator in the IS Department between February 1990 and July 1993."[3] App. 11.

The court stated that in *Evans* this Court "expressly precluded plaintiffs from using time-barred discriminatory acts to establish a *prima facie* case of employment discrimination." App. 12. It described *Ricks* as "extend[ing] *Evans* and [holding] that a plaintiff challenging a facially neutral employment termination decision cannot establish a *prima facie* case of discrimination by demonstrating that his termination gave effect to time-barred discriminatory acts." App. 12-13.

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[3] The court also stated that "Turlington does not rebut the conclusion of Kilpatrick, the manager of the IS Department, who determined that, in light of Turlington's prior performance in the IS Department, Turlington was not qualified even to be considered for the Class C Computer Operator position." App. 10-11. In fact, Turlington contended that his 26 years of experience in the IS Department, including 10 years as a shift supervisor and three years as a Class A Computer Operator, would in any event have created a genuine issue of material fact whether he was qualified for the lower Class C Operator's position.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT DECISION IS DIRECTLY CONTRARY TO THIS COURT'S DECISIONS IN *UNITED AIR LINES V. EVANS* AND *DELAWARE STATE COLLEGE V. RICKS*.

The Eleventh Circuit based its ruling on *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), and *Del. State College v. Ricks*, 449 U.S. 50, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). Yet a close examination of *Evans* and *Ricks* show that the cases are directly contrary to the Eleventh Circuit's conclusion.

In *Evans*, the plaintiff flight attendant was terminated in 1968 when she married (a practice later ruled illegal) and was rehired in 1972, but denied seniority for the intervening period. 431 U.S. at 554-55. She filed her EEOC charge more than one year *after her rehire* but argued her claim was timely and that United was guilty of a present, continuing violation of Title VII because the seniority system gave present effect to the past illegal discrimination. *Id.* at 557. This Court rejected that contention, holding that

> A discriminatory *act* which is not made the basis of a timely charge is the legal equivalent of a discriminatory *act* which occurred before the statute was passed.

Id. at 558 (Emphasis added).

However, the Court preceded this discussion by stating in note 9:

> Respondent cannot rely for jurisdiction on the single act of failing to assign her seniority credit for her prior service at the time she was rehired,

> for she filed her discrimination charge with the Equal Employment Opportunity Commission on February 21, 1973, more than one year after she was rehired on February 16, 1972. The applicable time period in February 1972 was 90 days. . . .

Id. at 557.

The clear implication of this note is that *had* Evans filed a charge of discrimination within 90 days of United's failing to assign her seniority credit at the time she was rehired, *her suit could proceed.*

The situation described in note 9 of *Evans* is identical to that of Petitioner Turlington. He suffered a denial of training prior to July of 1993, a first discriminatory act. He was rejected for the Class "C" computer operator's position in October of 1994, a second discriminatory act. He properly filed a charge within 180 days of the second discriminatory act in December of 1994. Under the standards set forth in note 9 in *Evans*, he can properly proceed with his claim for denial of the Class "C" position. In addition he may use the denial of training as relevant background evidence under *Evans*.

Del. State College v. Ricks requires no contrary result. Ricks was notified that he would not receive tenure in March 1974. Following college policy, he was offered a "one-year terminal" contract in June of 1974 to expire in June of 1975. He filed a charge of discrimination in April of 1975. 449 U.S. at 252-254. Ricks claimed a continuing violation, arguing that the limitations period did not commence to run until the terminal contract had expired. *Id.* at 257. This Court held Ricks had failed to identify any further discriminatory acts: "Indeed, the contrary is true.

It appears that termination . . . is a delayed, *but inevitable*, consequence of the denial of tenure." *Id.* at 257-258 (Emphasis added). Because Ricks was treated no differently from other unsuccessful tenure applicants, "the *only alleged discrimination occurred* – and the filing limitations period therefore commenced – at the time the tenure decision was made and communicated to Ricks." *Id.* at 258 (Emphasis added).

This Court observed in its note 9 that

> In this case the *only alleged discriminatory act* is the denial of tenure sought by a college professor, with the termination of employment not occurring until a later date. The application of the general principles discussed herein necessarily must be made on a case-by-case basis.

Id. at 258 (Emphasis added).

Thus, in *Ricks*, there was only one alleged discriminatory act, the denial of tenure. The termination was, by policy, *part of the same single* discriminatory act. Ricks' termination was the *inevitable* consequence of the tenure denial, under established college policy.

In Petitioner Turlington's case, there were *two* discrete acts of discrimination, the denial of training and the denial of the Class C operator position. Unlike in *Ricks*, the denial of the Class C operator's position does not *inevitably* flow from the denial of training, under an established policy tying the two acts together, and is not time-barred.

II. THE ELEVENTH CIRCUIT'S DECISION IS CONTRARY TO THE DECISIONS OF THE FOUR OTHER CIRCUITS WHICH HAVE EXAMINED IDENTICAL OR ANALOGOUS CASES.

A number of other Circuit Courts of Appeal have applied *Evans* and *Ricks* in cases identical or analogous to that of Turlington. All have reached results contrary to the Eleventh Circuit.

The Fourth Circuit's decision in *Lendo v. Garrett Co. Board of Education*, 820 F.2d 1365 (4th Cir. 1987), is *exactly* on point with Turlington. Lendo received two "not effective" evaluations in January of 1981, which the Board of Education relied on in denying him tenure in April 1981. He filed a charge within 90 days of the tenure denial, but not the evaluation. The circuit court specifically distinguished *Ricks*:

> In our view, the two "not effective" evaluations and the denial of tenure are more properly considered two separate retaliatory acts than cause and effect. There is no question that the denial of tenure in April was related to the two "not effective" ratings of the previous January. *Neither we, the district court, nor Lendo, however, could arrive at that conclusion except by hindsight.* When Lendo received the January evaluations, he could not have known with any certainty that he would eventually be denied tenure. *Assuming the Board's tenure procedures were conducted with any degree of fairness, it, too, could not have known before its April consideration whether it would deny Lendo tenure.* In *Ricks*, the denial of tenure was the only discriminatory act alleged. When Ricks received notice of the tenure denial and the terminal contract, he knew his employment

> would be terminated . . . In this case, however, Lendo alleged two distinct acts: the two "not effective" ratings and the denial of tenure. The Board may well have granted Lendo tenure despite the "not effective" ratings. In this ultimate sense, therefore, the denial of tenure was not an effect of the two previous negative evaluations, but a separate allegedly retaliatory act. . . .
>
> We hold that, while Lendo's first allegation is barred by the statute of limitations, the second is not. . . . The Board relied, in part, on the negative evaluations in making its tenure decision and thus, the denial of tenure was related to the evaluations. It did not, however, inevitably follow the evaluations so as to be an effect of them as contemplated by *Ricks*.

Id. at 1367-68 (Emphases added).

By the same reasoning, Turlington's claim is not time-barred by *Ricks*. Turlington could not have known, at the time he was denied training, that it would inevitably result in a later (indeed, much later) denial of the Class C position.

Other Circuit Courts of Appeals have reached conclusions contrary to *Turlington* in *Stoller v. Marsh*, 682 F.2d 971 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1037, 103 S.Ct. 1427 (1983); *Sangster v. United Air Lines*, 633 F.2d 824 (9th Cir. 1980), *cert. denied*, 451 U.S. 971, 101 S.Ct. 2048, 68 L.Ed.2d 350 (1981); *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991); and *Johnson v. General Electric*, 840 F.2d 132 (1st Cir. 1988).

In *Stoller v. Marsh*, 682 F.2d 971 (D.C.Cir. 1982), *cert. denied*, 460 U.S. 1037, 103 S.Ct. 1427 (1983), Judges Wright,

Edwards and Bazelon ruled that although the preparation of an evaluation might have been a time-barred act, a later use of that discriminatory evaluation for purposes of a promotion decision was an "unlawful discriminatory act in its own right." *Id.* at 979, note 10. Thus, the statute of limitations began to run anew at the time the original discriminatory evaluation was applied to Stoller. *Id.* at 978-79. The court distinguished *Evans:* "The new direct use of the evaluation gives it fresh significance and should be treated as a new and independent act of discrimination." *Id.* The court also specifically distinguished *Ricks*:

> In *Ricks* a college professor was denied tenure but received a one-year terminal contract; the Court held that the filing limitations periods commenced when the tenure decision was made, even though plaintiff did not lose his teaching position until later. In this case, in contrast, although preparation of the evaluation may have been a discriminatory act, the 1972 screening panel's decision is alleged to have been an unlawful discriminatory act in its own right.

Id., note 10.

The Ninth Circuit dealt with the scenario described in *United Air Lines v. Evans* note 9, and analogous to Turlington's, in *Sangster v. United Air Lines*, 633 F.2d 864 (9th Cir. 1980), *cert. denied*, 451 U.S. 971, 101 S.Ct. 2048, 68 L.Ed.2d 350 (1981). In *Sangster*, a flight attendant married in April of 1968, was denied a transfer because of her marital status in November 1968, and filed a charge less than 90 days later. The court ruled that the claim was not time-barred under *Evans*. *Id.*, 633 F.2d at 867.

The Ninth Circuit also distinguished *Ricks* in *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991). In *Bouman*, a Los Angeles County sheriff's deputy alleged sex discrimination in her failure to receive a promotion. The county contended that the date of the administration of a promotion exam and the promulgation of a resulting eligible list was the date from which the statute of limitations should run. *Id.* at 1221. The deputy contended that the date the eligible list expired, some two years later, was the appropriate date from which to mark time under the statute because she could have been promoted from the list until that date. *Id.* The Ninth Circuit distinguished *Ricks* and an earlier Ninth Circuit case "because in those cases plaintiff's termination or nonpromotion was a delayed but inevitable result of being denied tenure or not scoring well enough on the exam. In Bouman's case, by contrast, not until the list expired was it certain that she would not be promoted. She did not know until that date that she had suffered an injury." *Id.*

The First Circuit reviewed the reasons for adopting this view in its detailed analysis of *Ricks* in *Johnson v. General Electric*, 840 F.2d 132 (1st Cir. 1988).[4] In *Johnson*, the district court had held that a claim accrued when a discriminatory review process was established; the employee argued that the clock began to run when he was informed that he would not be promoted. *Id.* at 134.

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[4] Although *Johnson's* conclusion in a disparate impact case can be questioned in light of this Court's later ruling in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989) (*but cf.*, 490 U.S. at 917-919, dissent of Marshall, J.) its reasoning still applies in a case of disparate treatment such as Petitioners'.

The district court had relied on *Ricks* to dismiss the claim as time-barred. *Id.* The First Circuit found this reliance in error, emphasizing *Ricks* admonition that the proper focus is "upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* Observing that subsequent appellate cases had struggled to apply *Ricks* in various circumstances, the court stated:

> The issue can alternatively be framed as whether the *applications* of a discriminatory employment plan or evaluation constitute separate, cognizable discriminatory *acts* under *Ricks*, or whether they are merely consequences of earlier discriminatory acts. In other words, can the statute of limitations start running before there is certainty that *any* adverse employment decision disadvantaging the plaintiff will result from the discrimination?

Id. at 134-135.

The First Circuit observed that most circuits

> [H]ave reasoned, instead, that the application of a discriminatory system to a particular substantive decision (e.g., to promote, demote, fire, or award benefits), constitutes an independent discriminatory act which can trigger the commencement of the statute of limitations.

Id. at 135, and concluded:

> If the "notice" standard articulated in *Ricks* and in *Chardon v. Fernandez*, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981) (per curiam), is extended to cases where none of the implications of an evaluation, policy, or system have crystallized, a cause of action could accrue only when the

> plaintiff becomes subject to the discrimination, rather than when the discrimination causes any harm to the employee.

Id. at 136.

> The Court also raised the point of ripeness:
>
> In addition, it is far from clear whether claims under Title VII and analogous statutes would be ripe for adjudication until discriminatory systems were actually *applied* to plaintiffs in a particular employment decision. In *Ricks*, the professor's claim undoubtedly was ripe as soon as he was notified of his imminent dismissal. But it is questionable whether an action by an employee who has not yet suffered any injury as a result of a discriminatory system is sufficiently ripe.

Id.

By the same standard, Petitioner Turlington should not be required to file a claim before the effects of the discrimination have been visited upon him. It makes no sense to require him to file a charge of discrimination over the lack of training before that lack of training has been manifest in his later denial of a job.

The Eleventh Circuit's decision below is contrary to the established positions of the First, Fourth, Ninth and District of Columbia Circuits. This Court should take up this case to resolve this conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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July 30, 1998

Billy Joe TURLINGTON and Ellen Jocile Turlington, Plaintiffs-Appellants,

v.

ATLANTA GAS LIGHT COMPANY, Randy Curry, Robert Miller, Defendants-Appellees.

No. 97-8071.

United States Court of Appeals,
Eleventh Circuit.

Feb. 26, 1998.

Appeal from the United States District Court for the Northern District of Georgia.

Before BIRCH, Circuit Judge, HILL and KRAVITCH, Senior Circuit Judges.

KRAVITCH, Senior Circuit Judge:

This case raises two important issues regarding the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-34: the timing requirements for filing discrimination charges with the Equal Employment Opportunity Commission ("EEOC") and the standard for awarding attorney's fees to prevailing defendants.

Plaintiffs-appellants Billy Joe Turlington ("Turlington") and his wife, Ellen Jocile Turlington ("Mrs. Turlington"), sued the Atlanta Gas Light Company ("AGL") and two AGL employees, Randy Curry and Robert Miller, alleging, *inter alia*, that AGL discriminated against Turlington on the basis of his age in violation of the ADEA. The district court granted summary judgment to AGL on

this claim and awarded attorney's fees to AGL.[1] The Turlingtons appeal both rulings.

We affirm the district court's grant of summary judgment to AGL, but we vacate the attorney's fees award and remand the case to the district court to decide whether the Turlingtons litigated in bad faith and to substantiate its determination with appropriate findings.

I.

Turlington was employed by AGL from May 1967 to March 1995. Initially, he worked in AGL's Information Systems Department ("IS Department"), where he rose to the position of Supervisor of Shift Operations. In February 1990, he was demoted to Class A Computer Operator for failing to demonstrate job improvement during the prior year. Turlington presented evidence indicating that AGL, beginning in February 1990, denied him the same on-the-job training, practice time, skill training, and software training that it provided to his younger co-workers. Although Turlington complained about the denial of training, his supervisors told him that he was incapable of learning new skills.[2]

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[1] The Turlingtons' remaining claims were either abandoned at the summary judgment stage or dismissed by the district court.

[2] Among the evidence presented by Turlington was the affidavit of Gary Boykin, an IS Department employee with responsibility for training. Boykin confirmed that Turlington did not receive the same training as younger employees. Boykin also stated that Turlington's supervisor, Ed Norwood, said "that the younger employees were able to grasp the new technology

On July 9, 1993, having received four consecutive below-acceptable annual performance evaluations, Turlington was transferred to the Display Department, where he worked constructing signs manually. In an effort to block the transfer, Turlington submitted a written protest, which was prepared by a lawyer. The attorney also wrote AGL's Chief Executive Officer stating that he was representing Turlington "for the discriminatory action taken against [Turlington] over the last several years culminating with his transfer."[3] Turlington filed no discrimination charges with the EEOC at the time.

A year later, Turlington was still working in the Display Department when he applied for a Class C Computer Operator position in the IS Department.[4] On October 12, 1994, Dale Kilpatrick, manager of the IS Department, informed Turlington that he would not be considered for the position because of his previous performance in the IS Department. Turlington was 54 years old at the time.

On December 16, 1994, Turlington filed a discrimination charge with the EEOC alleging that AGL discriminated against him based on age by denying his

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faster and better than the older employees such as Mr. Turlington." Affidavit of Boykin at 4-5. According to Boykin, Turlington not only had the ability to learn but also used vacation time to develop his computer skills.

[3] Plaintiff's Ex. 6 at 1. This lawyer, Ted B. Herbert, was one of the lawyers representing Turlington in the district court proceedings in the instant case.

[4] The Class C Computer Operator position is ranked lower than the Class A Computer Operator position.

application for the Class C Computer Operator position and subsequently hiring a 23-year-old man for that position.[5] The accompanying affidavit stated that Turlington failed to obtain the job because his supervisors in the IS Department did not provide the same technical training to Turlington as they did to his younger co-workers.

On January 4, 1995,[6] the staff of the Display Department was told that the Display Department would be downsized to a single Display Coordinator. Later that month the Display Coordinator position was posted, and Turlington and two other candidates applied. After interviews and evaluations, a three-person panel rated each applicant, and based on these ratings, one of Turlington's two competitors, a 44-year-old man, was selected for the position. On February 17, 1995, Turlington amended his EEOC charge to incorporate his claim that AGL's failure to select him as Display Coordinator was discriminatory. Turlington's employment at AGL ended in March 1995.

In July 1995, the plaintiffs filed suit in federal district court alleging that the defendants: (1) discriminated against Turlington on the basis of his age in violation of the ADEA; (2) retaliated against Turlington for filing an EEOC charge; (3) breached contractual obligations to Turlington in violation of Georgia law; (4) intentionally and/

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[5] In his brief, Turlington states that he filed his EEOC charge on October 12, 1994, but the record indicates otherwise.

[6] Not at issue in this appeal is the fact that Turlington decided not to choose early retirement, an option available to him from November 15, 1994, to January 3, 1995.

or negligently inflicted emotional distress upon Turlington in violation of Georgia law; and (5) caused Mrs. Turlington's loss of consortium under Georgia law.

Turlington's complaint alleged that AGL violated the ADEA in several ways, including: (1) demoting him in February 1990; (2) failing to provide him adequate training from February 1990 to July 1993, thus "doom[ing] [him] to poor performance"[7] and substandard evaluations; (3) transferring him in July 1993; (4) refusing to hire him for the Class C Computer Operator position in October 1994; (5) refusing to hire him for the Display Coordinator position in 1995; and (6) thereafter discharging him.

Defendants filed a motion for summary judgment, which included a request for reasonable attorney's fees. The district court dismissed plaintiffs' claims against defendants Curry and Miller; deemed the retaliation, breach of contract, and emotional distress claims abandoned; dismissed the loss of consortium claim; granted summary judgment to AGL on the ADEA claim; and awarded attorney's fees and costs to AGL. Turlington appeals the district court's resolution of the ADEA claim and the award of attorney's fees.

On appeal, Turlington has narrowed significantly the basis of his ADEA allegations, arguing only that AGL discriminated against him on the basis of age when it denied him the Class C Computer Operator position in October 1994. According to Turlington, that decision was discriminatory because it was based on Turlington's poor

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[7] Complaint at 6, ¶ 16.

evaluations in the IS Department, which in turn resulted from AGL's discriminatory denial of training.

II.

A.

This court reviews *de novo* a district court's grant of summary judgment. We apply the same legal standards that bound the district court and view all facts and any reasonable inferences therefrom in the light most favorable to the non-moving party. *See Hale v. Tallapoosa County*, 50 F.3d 1579, 1581 (11th Cir.1995). Summary judgment is appropriate only when "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Where, as here, a plaintiff attempts to use circumstantial evidence to establish unlawful discrimination under the ADEA, this court employs the following burden-shifting scheme. Initially, the plaintiff must establish a *prima facie* case of discrimination. The employer then must respond with a legitimate, nondiscriminatory reason for its actions. In order to prevail, the plaintiff must establish that the employer's articulated legitimate, nondiscriminatory reason was a pretext to mask unlawful discrimination. *See Walker v. NationsBank of Fla. N.A.*, 53 F.3d 1548, 1556 (11th Cir.1995).

In an ADEA case involving discharge, demotion, or failure to hire, a plaintiff may establish a *prima facie* case by showing: (1) that he was a member of the protected group of persons between the ages of forty and seventy; (2) that he was subject to adverse employment action; (3)

that a substantially younger person filled the position that he sought or from which he was discharged; and (4) that he was qualified to do the job for which he was rejected. *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S.Ct. 1307, 1310, 134 L.Ed.2d 433 (1996) (stating that an ADEA plaintiff must show that he was replaced by someone "substantially younger," not necessarily by someone under age 40); *Jameson v. Arrow Co.*, 75 F.3d 1528, 1531 (11th Cir.1996) (listing elements of *prima facie* case). We apply this *prima facie* standard to Turlington's claim that AGL discriminated by denying him the Class C Computer Operator position in 1994.

Although a plaintiff's burden in proving a *prima facie* case is light, *see Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 439 (11th Cir.1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2511, 138 L.Ed.2d 1014 (1997), summary judgment against the plaintiff is appropriate if he fails to satisfy any one of the elements of a *prima facie* case. For example, summary judgment is appropriate against a plaintiff who fails to demonstrate that he was qualified to perform the position for which he was rejected. *See Baker v. Sears, Roebuck & Co.*, 903 F.2d 1515, 1520-21 (11th Cir.1990) (per curiam) (holding that terminated plaintiff failed to make out *prima facie* case under the ADEA; ruling that she was not qualified given her consistent failure to meet employer's quota for sale of maintenance agreements, a requirement of the position).

B.

In granting summary judgment to AGL on Turlington's ADEA claim, the district court held that Turlington failed to establish a *prima facie* case. Citing *Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 796 (11th Cir.), *amended by* 850 F.2d 1549 (1988), which addressed a Title VII claim rather than an ADEA claim, the district court stated that a plaintiff seeking to demonstrate a *prima facie* case under the ADEA must demonstrate, *inter alia*, that "a person outside of the plaintiff's class with equal or lesser qualifications was promoted, or the employer continued to seek applicants after the plaintiff was rejected for the position."[8] Then, focusing on AGL's denial of the Display Coordinator position, the district court ruled that Turlington failed to establish a *prima facie* case because the three-person panel that rated the applicants deemed the successful candidate to be more qualified than Turlington.

Moreover, according to the district court, Turlington could not establish a *prima facie* case by arguing that he *would have been* as qualified as the successful candidate but for AGL's allegedly discriminatory training practices. The district court ruled that such practices could not be used to establish a *prima facie* case because they ended in July 1993, prior to 180 days before Turlington filed charges with the EEOC in December 1994. *See* 29 U.S.C. § 626(d)(1) (stating that an employee claiming a violation of the ADEA must file charges with the EEOC not more

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[8] Summary Judgment Order at 6.

than 180 days after the date of the allegedly unlawful practice).

On appeal, Turlington argues that the district court erred in two ways: first, by addressing only AGL's denial of the Display Coordinator position, not the denial of the Class C Computer Operator position, and second, by concluding that 29 U.S.C. § 626(d)(1) precluded Turlington from using time-barred evidence to help establish a *prima facie* case. Abandoning all of his other allegations of ADEA violations, Turlington now argues only that he would have been qualified for the Class C Computer Operator position absent AGL's discriminatory training practices from February 1990 to July 1993.

C.

Although we disagree with some of the district court's analysis, we nonetheless affirm the district court's grant of summary judgment to AGL on Turlington's ADEA claim.[9] We note that a plaintiff seeking to establish a *prima facie* case under the ADEA must show only that he was qualified to do the job for which he was rejected, *see Jameson v. Arrow Co.*, 75 F.3d 1528, 1531 (11th Cir.1996), and, unlike a Title VII plaintiff, need not show that a

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[9] We may affirm the district court's decision for reasons different than those stated by the district court. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943) (stating that the decision of the lower court must be affirmed if the result is correct even though the lower court relied upon a wrong ground or gave a wrong reason), *cited in C.H. Robinson Co. v. Trust Co. Bank, N.A.*, 952 F.2d 1311, 1316 (11th Cir.1992).

person outside of the plaintiff's class with equal or lesser qualifications received the job, *cf. Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 796 (11th Cir.) (Title VII case), *amended by* 850 F.2d 1549 (1988). The district court thus erred in ruling that Turlington, in establishing a *prima facie* case, had to show that *"a person outside of the plaintiff's class with equal or lesser qualifications was promoted,* or [that] the employer continued to seek applicants after the plaintiff was rejected for the position." Summary Judgment Order at 6 (emphasis added).[10]

Because the district court primarily addressed AGL's denial of the Display Coordinator position, the district court did not squarely determine whether AGL's denial of the Class C Computer Operator position was discriminatory. Upon reviewing this allegation, we hold that Turlington failed to establish a *prima facie* case with regards [sic] to that adverse employment action. Turlington does not rebut the conclusion of Kilpatrick, the manager of the IS Department, who determined that, in light of Turlington's prior poor performance in the IS Department, Turlington was not qualified even to be considered for the Class C

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[10] The district court also erred by implying that an ADEA plaintiff could not make out a *prima facie* case unless he were replaced by someone outside the protected age class. *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S.Ct. 1307, 1310, 134 L.Ed.2d 433 (1996) (stating that an ADEA plaintiff must show that he was replaced by someone "substantially younger," not necessarily by someone under age 40). Furthermore, the district court incorrectly stated that the question of whether "the employer continued to seek applicants after the plaintiff was rejected for the position" is relevant in determining if an ADEA plaintiff has established a *prima facie* case.

Computer Operator position. Because he was rejected so early in the decisionmaking process, Turlington has failed to demonstrate his qualifications for the job. *Cf. Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 440 (11th Cir.1996) ("[B]ecause the decisionmakers for [the employer] were familiar with [the employee's] performance in his work . . . we can infer from the fact that he was granted an interview that [the employee] was at least at some level qualified for the new job."), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2511, 138 L.Ed.2d 1014 (1997). Even though the requirements of a *prima facie* case are light, *see id.* at 439, Turlington has failed to meet this burden, *see Baker v. Sears, Roebuck, & Co.*, 903 F.2d 1515, 1520-21 (11th Cir.1990) (per curiam) (ruling that ADEA plaintiff was not qualified for her position and thus did not establish a *prima facie* case).

Turlington contends that he *would have been* qualified for the Class C Computer Operator position if he had received better training, and thus better evaluations, while working as a Class A Computer Operator in the IS Department between February 1990 and July 1993. We hold, however, that the district court correctly ruled that Turlington could not use time-barred evidence of allegedly discriminatory training practices in order to establish a *prima facie* case. Two Supreme Court cases, *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), and *Del. State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), support the district court's analysis.[11]

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[11] The ADEA 180-day limitations period, *see* 29 U.S.C. § 626(d)(1), is quite similar to the Title VII limitations period, *see*

In *Evans*, the Court expressly precluded plaintiffs from using time-barred discriminatory acts to establish a *prima facie* case of employment discrimination. The plaintiff in *Evans* was forced to resign in 1968 when she married in violation of the company's policy of refusing to allow its female flight attendants to be married. 431 U.S. at 554, 97 S.Ct. at 1887. Although the plaintiff was rehired in 1972 after the policy was invalidated, she was not awarded seniority credit for her time off. *Id.* at 555, 97 S.Ct. at 1887. The Court held that the plaintiff could not attack the otherwise neutral seniority system merely by demonstrating that the system gave present effect to past discrimination.

> [A] discriminatory act which occurred before the statute was passed . . . may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences. . . . [S]uch a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer.

Id. at 558-60, 97 S.Ct. at 1889-90.

In *Ricks*, the Court extended *Evans* and held that a plaintiff challenging a facially neutral employment termination decision cannot establish a *prima facie* case of discrimination by demonstrating that his termination

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42 U.S.C. § 2000e-5(e)(1). Thus, although *Evans* and *Ricks* are Title VII cases, they provide clear guidance in the instant ADEA case.

gave effect to time-barred discriminatory acts.[12] Explicitly rejecting the plaintiff's "continuing violation" theory, *see* 449 U.S. at 257-58, 101 S.Ct. at 504-05, the Court stated:

> It is simply insufficient for [the employee] to allege that his termination gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination. The emphasis is not upon the effects of earlier employment decisions; rather, it is upon whether any present *violation* exists.

Id. at 258, 101 S.Ct. at 504 (quoting *Evans*, 431 U.S. at 558, 97 S.Ct. at 1888) (internal quotations omitted) (emphasis in original).

In light of *Evans* and *Ricks*, Turlington failed to establish a *prima facie* case of discrimination. Turlington alleges that AGL's denial of the Class C Computer Operator position in October 1994, although not discriminatory on its face, nonetheless violated the ADEA by giving effect

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[12] The plaintiff in *Ricks*, after being denied tenure, received a one-year "terminal" contract. 449 U.S. at 252-53, 101 S.Ct. at 501. He only filed charges with the EEOC, however, near the end of that contract. *Id.* at 254, 101 S.Ct. at 502. Because the denial of tenure occurred long before the filing of the EEOC charge, the Court held that the plaintiff's termination was facially neutral.

> [T]he only alleged discrimination occurred – and the filing limitations period therefore commenced – at the time the tenure decision was made and communicated to Ricks. That is so even though one of the *effects* of the denial of tenure – the eventual loss of a teaching position – did not occur until later. . . .

Id. at 258, 101 S.Ct. at 504 (footnote omitted) (emphasis in original).

to past acts of discrimination that occurred from February 1990 to July 1993.[13] Because plaintiffs may not use time-barred discriminatory acts to help establish a *prima facie* case of discrimination, *see Evans*, 431 U.S. at 558-60, 97 S.Ct. at 1889-90, evidence of AGL's prior training practices cannot render discriminatory AGL's facially neutral decision to deem Turlington unqualified for the Class C Computer Operator position, *see Ricks*, 449 U.S. at 258, 101 S.Ct. at 504.[14]

We also reject the application of equitable tolling to this case. ADEA's timing requirements might have been

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[13] The district court correctly found that the allegedly discriminatory training practices ended in July 1993, more than 180 days before Turlington's initial EEOC filing in December 1994. Although the complaint does allege that Turlington was denied requests for computer training while in the Display Department, the complaint does not state that this denial of training was discriminatory.

[14] Recent precedent in this circuit supports our determination that Turlington failed to present a "continuing violation" that would allow AGL's liability to be premised on time-barred acts. *See Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 448 (11th Cir.1993) (distinguishing between "the present consequence of a one time violation, which does not extend the limitations period, and the continuation of the violation into the present, which does") (quoting *Beavers v. Am. Cast Iron Pipe Co.*, 975 F.2d 792, 796 (11th Cir.1992)). No continuing violation existed here because AGL's allegedly discriminatory training practices ended prior to 180 days before Turlington filed charges with the EEOC. *Cf. Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 760, 762 (9th Cir.1980) (applying continuing violations theory where allegedly discriminatory promotion, compensation, and training policies continued to exist during the 180-day time period prior to the filing of the EEOC charge).

equitably tolled if, in the period prior to the 180 days before filing the initial EEOC charge, Turlington had no reason to believe he was a victim of unlawful discrimination. *See Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 660 (11th Cir.1993), *cert. denied*, 513 U.S. 814, 115 S.Ct. 69, 130 L.Ed.2d 24 (1994).[15] The evidence, however, indicates that Turlington, during his time as a Class A Computer Operator in the IS Department, protested vigorously against his failure to receive the same training opportunities offered to his younger co-workers. Moreover, Turlington retained his district court counsel at least as of July 9, 1993, upon being transferred out of the IS Department. Under these circumstances, Turlington cannot rely on the theory of equitable tolling to preserve his right to hold AGL liable for discriminatory training practices.[16] *See*

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[15] We need not address here all of the possible grounds for overlooking the ADEA's timing requirements. *Cf. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982) ("[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.").

[16] Turlington would have had an actionable claim under the ADEA for denial of training only if, after filing a charge of discrimination with the EEOC in a timely fashion, Turlington had established that AGL denied material training opportunities to him on the basis of age. As this court has held, the ADEA "forbids far more than merely discriminatory discharge and hiring practices." *See Stamey v. S. Bell Tel. & Tel. Co.*, 859 F.2d 855, 860 (11th Cir.1988), *cert. denied*, 490 U.S. 1116, 109 S.Ct. 3178, 104 L.Ed.2d 1040 (1989). The ADEA makes it illegal for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or

McClinton v. Ala. By-Products Corp., 743 F.2d 1483, 1487 (11th Cir.1984) (rejecting equitable tolling where ADEA plaintiff "suspects that he may have been discriminated against on account of age and is also generally aware of his legal right to obtain redress for that wrong"). The ADEA's limitations period thus bars Turlington from establishing a *prima facie* case based on evidence of AGL's prior discrimination in training.

D.

Turlington cites several cases purporting to demonstrate that he may establish a *prima facie* case with the help of time-barred evidence of AGL's discriminatory training practices. Turlington, however, fails to dispute the controlling authority of *Evans* and *Ricks*. Moreover, the cases he cites are inapposite.

For example, four cases merely hold that a plaintiff can use evidence of time-barred discriminatory conduct

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privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Discrimination with respect to training programs is thus actionable under the ADEA, *see Kusak v. Ameritech Info. Sys., Inc.*, 80 F.3d 199, 201 (7th Cir.1996) ("An employer might offer training programs, promotion opportunities, or disability benefits to its employees, and the ADEA makes it clear that the employer may not condition access to those benefits on the age of the employee."), as long as the training is materially related to the employee's job responsibilities or possibilities for advancement, *cf. Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 135-36 (7th Cir.1993) (stating that ADEA plaintiff must allege "materially adverse employment action").

to meet his *burden of persuasion* in a case involving circumstantial evidence of discrimination. *See Allen v. County of Montgomery*, 788 F.2d 1485, 1488 (11th Cir.1986); *Downey v. S. Natural Gas Co.*, 649 F.2d 302, 304-05 (5th Cir. Unit B June 1981); *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 540 (5th Cir.1980), *cert. denied*, 449 U.S. 1115, 101 S.Ct. 929, 66 L.Ed.2d 845 (1981); *Mathewson v. Nat'l Automatic Tool Co., Inc.*, 807 F.2d 87, 91 (7th Cir.1986). In none of these cases did the court hold that a plaintiff could use evidence of time-barred conduct to establish a *prima facie* case of discrimination. To the contrary, in *Taylor v. Hudson Pulp & Paper Corp.*, 788 F.2d 1455, 1461-62 (11th Cir.1986), *cert. denied*, 484 U.S. 953, 108 S.Ct. 345, 98 L.Ed.2d 371 (1987), this court explicitly excluded time-barred conduct in determining that the plaintiff failed to establish a *prima facie* case of discrimination.

Turlington also relies on three disparate impact cases that are not applicable here. *See Walker v. Jefferson County Home*, 726 F.2d 1554 (11th Cir.1984); *Crawford v. Western Elec. Co., Inc.*, 614 F.2d 1300, 1314 (5th Cir.1980); *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir.1980). In *Walker*, the plaintiff sued for failing to be selected for an employment position in 1974. 726 F.2d at 1557. The court held that the employer's decision in 1974 was discriminatory, though neutral on its face, because the decision was based on the plaintiff's lack of supervisory authority, which in turn resulted from the employer's discriminatory decision in 1972 to deny the plaintiff a supervisory position. *Id.* at 1558. Recognizing that *Evans, supra*, would bar consideration of the 1972 action in a disparate treatment case, the court deemed the 1972

action relevant because Walker's claim could be characterized as one of disparate impact. *Id.* at 1557 & n. 1. Like *Walker*, *Crawford* and *Gonzalez* also involved disparate impact claims. *See Crawford*, 614 F.2d at 1314-18; *Gonzalez*, 610 F.2d at 244, 249.

Turlington's claim, however, is not based on disparate impact.[17] To demonstrate disparate impact, a plaintiff must demonstrate that an employer's facially neutral practice or test had an adverse impact on a particular protected group. *See Edwards v. Wallace Community College*, 49 F.3d 1517, 1520 (11th Cir.1995). Turlington does not allege that older workers as a class were denied training, but only that *he* was denied training because of

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[17] Because we rule that Turlington's claim did not incorporate a disparate impact theory, we need not reach two additional issues: whether *Walker* is still valid law in light of *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648 (11th Cir.1993) (rejecting disparate impact claim because freezing of compensation levels within 180 days of EEOC filing merely gave effect to prior discriminatory pay and progression system and did not constitute continuing discrimination), *cert. denied*, 513 U.S. 814, 115 S.Ct. 69, 130 L.Ed.2d 24 (1994), and whether the ADEA permits disparate impact claims. Neither this court nor the Supreme Court expressly has allowed disparate impact claims under the ADEA. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 1706, 123 L.Ed.2d 338 (1993) (reserving the issue). *Compare District Council 37 v. New York City Dep't of Parks and Recreation*, 113 F.3d 347, 351 (2d Cir.1997) (holding that disparate impact theory is cognizable under ADEA), *with EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076-78 (7th Cir.1994) (suggesting that disparate impact theory is not cognizable under ADEA), *cert. denied*, 515 U.S. 1142, 115 S.Ct. 2577, 132 L.Ed.2d 828 (1995).

his age. Because Turlington's case relies solely on a disparate treatment theory, *Evans* and *Ricks* preclude him from using time-barred discriminatory acts to establish a *prima facie* case of discrimination. We thus affirm the district court's grant of summary judgment against him.

III.

Finally, we address the question of whether the district court erred in awarding attorney's fees to AGL. After granting summary judgment to AGL, the district court issued a separate order granting defendants reasonable attorney's fees and costs and dismissing the action. The district court made no findings in support of this order.[18] The Turlingtons argue that the district court abused its discretion by awarding attorney's fees to the prevailing defendants without having found that the Turlingtons litigated in bad faith.

We review *de novo* the legal basis of a district court's decision to award attorney's fees to prevailing defendants. *Cf. Kreager v. Solomon & Flanagan, P.A.*, 775 F.2d 1541, 1542-43 (11th Cir.1985). This circuit has not determined the circumstances under which a prevailing defendant may obtain attorney's fees in an ADEA case.

The ADEA incorporates selected provisions of the Fair Labor Standards Act ("FLSA"), including those pertaining to attorney's fees. *See* 29 U.S.C. § 626(b) (stating

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[18] Indeed, with the exception of a brief request for attorney's fees in defendants' motion for summary judgment, the parties did not litigate the issue of attorney's fees before the district court.

that attorney's fees provision of the FLSA, 29 U.S.C. § 216(b), applies to actions brought under the ADEA). Although the attorney's fees provision of the FLSA does not address whether, or under what circumstances, attorney's fees should be awarded to a prevailing defendant, *see* 29 U.S.C. § 216(b), this court has held that the FLSA entitles a prevailing defendant to attorney's fees only where the district court finds that the plaintiff litigated in bad faith, *see Kreager*, 775 F.2d at 1542-43 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975) (stating that courts have the "inherent power" to assess attorney's fees where a losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons")). Given the close relationship between the ADEA and the FLSA, *see* 29 U.S.C. § 626(b), we hold that a district court may award attorney's fees to a prevailing ADEA defendant only upon a finding that the plaintiff litigated in bad faith. Several other circuits have so ruled. *See EEOC v. Hendrix College*, 53 F.3d 209, 211 (8th Cir.1995); *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 883 (7th Cir.1994); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 260 & n. 1 (1st Cir.1986); *Morgan v. Union Metal Mfg.*, 757 F.2d 792, 796 (6th Cir.1985).[19]

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[19] This rule differs significantly from the rule governing the award of attorney's fees to prevailing defendants in Title VII cases. Title VII, unlike the ADEA and the FLSA, explicitly authorizes the award of attorney's fees to "the prevailing party." *See* 42 U.S.C. § 2000e-5(k). Thus, in Title VII cases, a district court "may in its discretion award attorney's fees to a prevailing defendant . . . upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg*

Here, the district court made no findings whatsoever regarding the Turlingtons' bad faith in litigating the case. On appeal, AGL points to several of the Turlingtons' litigation decisions as evidence of their bad faith. We believe, however, that an inquiry into a party's bad faith is best conducted by the district court.[20] We thus vacate the attorney's fees award and remand the case to the district court to decide whether the Turlingtons litigated in bad faith and to substantiate its determination with

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Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978).

[20] Relying on *Head v. Medford*, 62 F.3d 351 (11th Cir.1995), AGL contends that this court should decide whether the Turlingtons litigated in bad faith. In *Head*, the district court granted summary judgment to the defendants on the plaintiff's federal civil rights claims, but failed to award attorney's fees to the defendants. *Id.* at 353-55. A prevailing civil rights defendant is entitled to attorney's fees if the plaintiff's claim was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 355 (citation omitted) (describing attorney's fees statute, 42 U.S.C. § 1988). The *Head* court held that the plaintiff's claims were legally frivolous and that the defendants were entitled to attorney's fees "unless the district court points out special circumstances that justify making no award of fees." *Id.*

This court's limited remand in *Head*, however, is not relevant here. In contrast to the defendants in *Head*, prevailing defendants in ADEA cases are entitled to attorney's fees only if the plaintiffs litigated in bad faith. We believe that the determination of bad faith is a complex inquiry that should be conducted initially by the district court, not an appellate court. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, 100 S.Ct. 2455, 2465, 65 L.Ed.2d 488 (1980) (ruling that the district court erred in awarding attorney's fees to a prevailing defendant without making findings as to bad faith; directing that the case be returned to the district court to make appropriate findings).

appropriate findings. *See Kreager,* 775 F.2d at 1543 (vacating and remanding where district court awarded attorney's fees to prevailing defendant in FLSA case without making specific findings of bad faith).

AFFIRMED IN PART. VACATED AND REMANDED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BILLY JOE TURLINGTON, *et al.*,	:	
Plaintiffs,	:	CIVIL ACTION NO.
	:	1:95-cv-1872-CC
vs.	:	
ATLANTA GAS LIGHT COMPANY, *et al.*	:	
Defendants,	:	

ORDER

(Filed Nov. 27, 1996)

Pending before the Court are Defendants' Motion for Summary Judgment [16-1] and Plaintiff's Request for Extension of Time to Respond to Defendants' Motion for Summary Judgment [19-1].

FACTS

Plaintiff Billy Joe Turlington ("Plaintiff") was employed by the Atlanta Gas Light Company ("Defendant") from May 31, 1976 [sic] until March 1995. Plaintiff was employed in Defendant's Information Systems Department ("IS Department") until July 9, 1993. In July 1993, after having received four consecutive below-acceptable annual performance evaluations, Plaintiff was transferred to Defendant's Display Department as a Display Specialist. Robert Jeanneret already was a Display Specialist when Plaintiff was transferred into the Display Department.

Sometime between June 1994 and December 15, 1994 Defendant proposed that the Display Department be downsized. The staff for the department was to be reduced from two full-time Display Specialists and a Supervisor, to one Display Coordinator. In November 1994, Defendant offered an early retirement program to eligible employees. Eligible employees had from November 15, 1994 until January 3, 1995 to consider the program. Plaintiff was an eligible employee, but chose not to take early retirement under the program.

On January 4, 1995 the staff of the Display Department was told about the restructuring. On or about January 26, 1995, the Display Coordinator position was posted. Plaintiff, Jeanneret, and a third candidate applied for, and were interviewed for, the position. A panel of three rated each of the applicants on nine factors. Jeanneret received a rating of 136, Plaintiff received 93, the third candidate received 92. Jeanneret was chosen for the position.

DISCUSSION

Summary judgment only is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Where supporting or opposing affidavits are used, the

> affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that

> the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Fed. R. Civ. P. 56(e). Because the procedure deprives the parties of a trial on the issues, the court must be careful to ensure that only those claims for which there is no need for a factual determination as to any material fact are disposed of by summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In addition, a court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant. *Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988); *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986), *reh'g denied*, 815 F.2d 66 (11th Cir. 1987). To survive a motion for summary judgment, the non-moving party need only present evidence from which the trier of fact might return a verdict in his favor. *Samples*, 846 F.2d at 1330. However, Rule 56, "[b]y its very terms, . . . provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-8 (1986) (emphasis in original). The materiality of facts is governed by the substantive law. *Id.* at 248. A dispute is genuine if the evidence is such that the factual issues "may reasonably be resolved in favor of either party." *Id.* at 250.

Consideration of a summary judgment motion does not lessen the burden on the non-moving party. The non-moving party still bears the burden of coming forth with

sufficient evidence on *each element* that must be proved. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990) (emphasis in original); *see Celotex*, 477 U.S. at 322-23. "If on any part of the prima facie case there would be insufficient evidence to require submission of the case to the jury, [the court] must . . . grant . . . summary judgment for the defendant." *Earley*, 907 F.2d at 1080 (citations omitted). In *Earley*, the Eleventh Circuit further emphasized:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. . . . Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. . . . In such circumstances, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. . . . If the evidence is *merely colorable*, or is *not significantly probative*, summary judgment may be granted.

Id. (emphasis in original) (citations omitted).

In ruling on a motion for summary judgment, a court "must evaluate the evidence in light of the proper standard of proof. In a discrimination case, the plaintiff bears the ultimate burden of proving discriminatory treatment by a preponderance of the evidence." *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987) (citations omitted). "Summary judgments for defendants are not rare in

employment discrimination cases." *Earley*, 907 F.2d at 1081 (citations omitted).

As a preliminary matter, based on Plaintiffs' representations, Plaintiffs' claims against Defendants Curry and Miller are dismissed with prejudice. Moreover, Plaintiff has abandoned his claims for breach of contract, intentional and negligent infliction of emotional distress and retaliatory discharge, by failing to respond to Defendant's motion for summary judgment on these issues. Because Plaintiff's state law claims have been abandoned, Plaintiff Ellen Jocile Turlington's claim for loss of consortium also is dismissed. *Godby v. Electrolux Corp.*, 1994 U.S. Dist. LEXIS 10760, at * 5 (N.D. Ga. 1994).

The only matters remaining, therefore, are Plaintiff's various theories of disparate treatment based on age, under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq.* ("ADEA")

First, given the date Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission, Defendant correctly points out that this Court only can consider events occurring in June 1994 or later. 29 U.S.C. § 626(d)(1).

Second, Plaintiff seemingly seeks to prove, through indirect evidence, that he was denied the Display Coordinator position in violation of the ADEA. When a plaintiff attempts to prove discriminatory intent by indirect evidence under the ADEA, the plaintiff has the burden of presenting a *prima facie* case.[1] In order to present a *prima*

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[1] The only arguable direct evidence of discrimination submitted by Plaintiff is Plaintiff's claim that Mr. Curry stated

facie case, where a plaintiff did not receive an available position, a plaintiff generally must show: (1) there was a position available, (2) the plaintiff is a member of a protected class, (3) the plaintiff is qualified for and applied for the promotion, (4) the plaintiff was rejected, (5) a person outside of the plaintiff's class with equal or lesser qualifications was promoted, or the employer continued to seek applicants after the plaintiff was rejected for the position. *Roberts v. Gadsden Memorial Hospital*, 835 F.2d 793, 796 (11th Cir. 1988).

If the plaintiff presents a *prima facie* case the defendant must then articulate a legitimate, non-discriminatory reason for the alleged discriminatory action in order to avoid liability. If the defendant carries this burden, the plaintiff then has the opportunity to prove, by a preponderance of the evidence, that the reasons offered by the defendant were a mere pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973).

In the present case, Plaintiff established Defendant had a Display Coordinator position available, Plaintiff's age places him in a protected class, and Plaintiff applied for the available position. The Court finds there is a genuine issue of material fact as to whether Plaintiff was qualified for the position. There is no dispute that Plaintiff did not receive the position, and instead, Jeanneret, an employee outside of the protected class, received the position.

"older people tended not to pick upon [sic] on new things." This, by itself, however, does not constitute direct evidence of discrimination. Thus, the Court focuses on indirect evidence.

Plaintiff, however, did not meet his burden to establish a *prima facie* case because the undisputed evidence shows that a three-person panel deemed Jeanneret to be more qualified than Plaintiff. Plaintiff does not contend that he was as, or better, qualified than Jeanneret. Indeed, in his brief he states that Jeanneret who had five (5) years experience in the Display Department "was the obvious choice over the Plaintiff to get the job."

Third, Plaintiff claims Defendant's evaluation and training systems are discriminatory against older workers. The evaluations to which Plaintiff refers in connection with this allegation, however, were done prior to June 1994. Similarly, the denial of training about which Plaintiff complains occurred between 1990 and 1993.

Under certain circumstances, allegedly discriminatory yet unchallenged behavior, outside of the relevant limitations period, may buttress an ADEA claim if future employment decisions are based on the discriminatory behavior. The Court finds that this is not such a circumstance. Indeed, Plaintiff has failed to present sufficient evidence in support of his assertion that the evaluation and training systems were discriminatory.

Finally, Plaintiff seems to argue that summary judgment is inappropriate if Defendant's decision to downsize the Display Department was a result of Plaintiff's decision not to accept early retirement. The Court agrees. However, it appears from Defendant's evidence that the proposal to downsize was made no later than December 15, 1994, and the final decision to downsize was made sometime between December 15, 1994 and January 4, 1995. While Defendant does not state the precise date that

the final decision was made, Plaintiff has presented nothing to rebut Defendant's evidence that the decision to downsize was unrelated to Plaintiff's decision not to take early retirement.

Defendants' Motion for Summary Judgment is GRANTED.

CONCLUSION

Defendants' Motion for Summary Judgment is GRANTED. [16-1] Plaintiff's Request for Extension of Time to Respond to Defendants' Motion for Summary Judgment is GRANTED. [19-1]

IT IS SO ORDERED this 27th day of Nov, 1996.

/s/ Clarence Cooper
CLARENCE COOPER
UNITED STATES
DISTRICT JUDGE

(entered on Docket Nov. 29, 1996)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-8071

BILLY JOE TURLINGTON,
ELLEN JOCILE
TURLINGTON,

Plaintiffs-Appellants,

versus

ATLANTA GAS
LIGHT COMPANY,
RANDY CURRY, *et al*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion ___, 11th Cir.,
19___, ___F.2d___).

(Filed May 1, 1998)

Before: BIRCH, Circuit Judge, HILL and KRAVITCH, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
SENIOR UNITED STATES
CIRCUIT JUDGE

ORD-42
(6/95)

STATUTORY PROVISION

Age Discrimination in Employment Act

29 U.S.C. §626(d)(1):

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed –

(1) within 180 days after the alleged unlawful practice occurred;